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Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of The United States

(MARCH TERM, 2002)

JAMES J. MC MANUS,
Petitioner,

v.

LESLIE CRAWFORD,
Respondent,

On Petition for a Writ of Cértiorari
to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

James J. McManus
In propria Persona

P.O. Box 4673
Rio Rico, Arizona 85648

21 pp

QUESTION PRESENTED

Is it a violation of both the Equal Protection and Due Process clauses for a state court to interpret a state statue in a directly contradictory manner, depending on who are the parties?

PARTIES TO THE PROCEEDING

Rule 14.1 (b) Statement: Only Petitioner James J. McManus and respondent Leslie Crawford were parties to the proceeding before the Arizona appellate Courts, culminating in the Arizona Supreme Court's refusal to review.

Rule 29.6 Statement: The Defendant, Leslie Crawford was a nurse for El Dorado Hospital, Tucson, Arizona and she was defended by their insurance carrier.

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Arizona Revised Statue § 12-563

PETITIO' ..OR WRIT OF CERTIORARI

Petitioner James J. McManus, respectfully request that a Writ of Certiorari issue to the Arizona Supreme Court as to its judgment entered October 5th, 2001, refusing review of the Arizona Court of Appeals. I respectfully request that the Court grant this petition, vacate the judgment below and remand for further consideration in light of the Fourteenth Amendment, United States Constitution. That is, I have been treated differently and adversely than others in similar conditions and circumstances, in regard to Arizona Revised Statute § 12-563.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals appears at Appendix A to the petition and is unpublished. The Supreme Court of Arizona's judgment denying review appears as Appendix B.

JURISDICTION

The Judgment of the Arizona Supreme Court, denying review, was entered on October 5th, 2001. Because that is the highest court of the jurisdiction of Arizona, the jurisdiction of this Court is invoked under 28 U.S.C., § 1257.

STATUES INVOLVED

Arizona Revised Statue § 12-563 explicity states:

Necessary elements of proof:

Both of the following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.

2. Such failure was a proximate cause of the injury.

STATEMENT OF THE CASE

I have suffered **permanent and painful injury** due to a slipshod catheterization which was performed by an incompetent nurse. I sued the nurse who performed the bad procedure, who was just a few months from retirement, and the hospital where she worked for malpractice. The trial court ruled in summary judgment that I had no competent medical expert, as required by A.R.S. § 12-563, when I had actually named two: a nurse and a board certified urologist. (The court required me to narrow it to one expert so I naturally chose the urologist). The trial court ruled against the urologist being an expert because his credentials are in Mexico. The trial court knew full well that I had also listed a Tucson, Arizona nurse, who had done hundreds of catheterizations, and who would testify in my behalf, but summary judgment was granted anyway.

When the trial court threw out my case, I appealed to the Arizona Court of Appeals and they wrote the unpublished opinion found in Appendix A. The court of Appeals interpreted an Arizona case, ***McGuire v. DeFrancesco,*** 811 P.2d 340 (1990) in exactly the opposite sense that the words appear in the pages of the case, as is explained in the section on why this petition should be granted. I can only believe it is because I am suing ***in propria persona.***

I then appealed to the Supreme Court of Arizona, who also refused to apply the words of ***McGuire v. De Francesco***, just as they are written on the pages of the case. I have therefore come to you seeking justice.

REASONS FOR GRANTING THE PETITION

If the opinion below is allowed to stand, it will effectively eliminate American health care from the protection of both the Equal Protection clause and the Due Process Clause. That is, the statue which was interpreted in the case, Arizona Revised Statue § 12-563, has been interpreted in a variety of conflicting ways.

It is important to realize that this is not a mere question of evidence ***vis-á-vis*** a trial court's discretion in one jurisdiction. Instead, it is a matter of Federal importance because it undermines the very nature of judicial interpretation and the right of every litigant to expect a specific result. If the opinion below is allowed to stand, not only the courts of Arizona, but every American court considering health care, will be at liberty to disregard ***stare decisis.***

What makes this case especially telling is the fact that it turns upon the interpretation of one case. That is, it does not require extensive legal training or sophisticated forensic reasoning, it is simply a question of whether the courts below are free to say that some litigants will get one interpretation and other litigants will get another, even though the law is applied to similarly situated litigants.

The one case is ***McGuire v. DeFrancesco,*** 811 P. 2d 340 (1990), which actually says on page 344:

> We hold today only that the courts will not shut their doors to evidence, when probative evidence is offered, that a national minimal standard establishes the minimal "degree of care, skill and learning expected of a reasonable prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances." Ariz. Rev. Stat. Ann. § 12-563.

Applied to my case, that meant that I offered **three** (3) authorities: (1) Dr. Rivera, a board certified urologist practicing in Nogales, Sonora, Mexico, 10 minutes from Nogales, Arizona, who had also attended lectures in Nogales, Az., USA; (2) Carol Wichita, R.N., who was familiar with Arizona catheterization standards, because she has been a nurse in Tucson, AZ. for 30 years, & (3) ***Campbell's Urology, Fifth Edition,*** distributed throughout the world and used in AZ. and the U.S. Despite my three sources of authority, my case was thrown out and I was denied justice.

Please consider carefully on that same page 344 of 811 P.2d 340, these additional words from ***McGuire v. DeFrancesco***:

> We next consider defendants' argument and the trial court's finding that Dr. Wade's testimony lacked foundation because he had no first-hand experience with the practice of medicine in Arizona. Again, we disagree, and again we turn to ***Pollard*** for support. There defendants claimed that the plaintiffs' expert lacked foundation to establish the "same of similar community" standard because his affidavit did not specify that he was familiar with the standard of practice in Phoenix. This court rejected the argument. Plaintiffs' expert had asserted his familiarity with a minimum standard of care applicable to the treatment of traumatic wounds **wherever medicine is practiced**, and we pronounced this testimony adequate to defeat summary judgment "[e]ven under the restrictive locality test." 117 Ariz. At 365, 372 P.2d at 1203. [emphasis added]

The crucial words are, of course, "wherever medicine is practiced." No one denies that medicine is practiced in México and this Mexican Urologist had attended classes in Nogales,AZ, and was 1st in the Urology medical board exams for his generation.

The bitter irony of the foregoing is that the Court of Appeals opinion cites the identical case as holding exactly the opposite of the foregoing:

> This statute, as we made clear in ***McGuire v. DeFrancesco,*** imposes a statewide standard of care, rather than a universal standard of care, for all health care providers.

To this injury, the Court of Appeals then added the following sentence of insult:

> And, as we noted in ***Gary v. Willcut,*** 146 Ariz. 575, 707 P.2d 979 (App.1985), the plaintiff must establish this statewide standard of care to withstand summary judgment.

As proven in the brief analysis above, proving a universal standard does, according to the law of Arizona, prove the statewide standard. The law of Arizona was not obeyed and that is why I have appealed to the Supreme Court of the United States.

If the Writ of Certiorari does not issue, every litigant concerned with health care, corporate and individual, will be deprived of ***stare decisis*** and thereby of a rational expectation in regard to a given court's ruling. As this Court aptly held in ***Chambers v. Baltimore & Ohio R.R.***, 207 U.S. 142 (1907) at 148: " The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government."

If the Supreme Court of the United States does not grant the Writ, then any person, any corporation can be next.

RESPECTFULLY SUBMITTED this 4th day of January, 2002.

James J. Mc Manus
Petitioner
P.O. Box 4673
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1- (520) 761-4125

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMES J. McMANUS,	)	
	)	2CA-CV 00-0022
Petitioner / Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
LESLIE CRAWFORD,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Defendant/Appellee.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF
PIMA COUNTY

Cause No. 326349

Honorable Kenneth Lee, Judge

AFFIRMED

James J. McManus — Benson
In Propria Persona

Teilborg, Sanders & Parks, P.C.
By Kari B. Zangerle, Vicent J. Montell,
and Stephen M. Johnson — Phoenix
Attorneys for Defendant/Appellee

D R U K E, Judge.

¶1 James McManus filed a complaint against nurse Leslie Crawford alleging that she had committed medical malpractice when she performed a post-surgery penile catheterization on him. McManus appeals the trial court's granting of Crawford's motion for summary judgment, which we review de novo.[1] We affirm.

¶2 We first address Crawford's argument that this court lacks jurisdiction to entertain the appeal because McManus filed his notice of appeal after the trial court had issued its minute entry ruling on the motion for summary judgment but before it had entered a signed, final judgment. Our supreme court considered and rejected this same argument in *Barassi v. Matison,*[2] holding "that a premature appeal from a minute entry order in which no appellee was prejudiced and in which a subsequent final judgment was entered over which [appellate] jurisdiction may be exercised need not be dismissed." Because Crawford does not claim any prejudice from McManus's premature appeal, we have jurisdiction.

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[1] *Link v. Pima County,* 193 Ariz. 336, 972 P. 2d 669 (App. 1998).

[2] 130 Ariz. 418, 422, 636 P. 2d 1200, 1204, (1981). *See also Comeau v. Arizona Bd. of Dental Exam'rs,* 196 Ariz. 102, 993 P. 2d 1066 (App. 1999).

¶3 McManus argues on appeal that, in granting summary judgment, the trial court errored in ruling that his expert, Dr. Rivera, "does not have foundation to offer an opinion about the standard of care of nurses practicing in Arizona or the United States." We review a trial court's ruling on the admissibility of expert opinion evidence for a clear abuse of discretion[3]. McManus asserts that "[a]n expert in this case must know the preparation of catheterization, the procedure and its ram[i]fications and that knowledge in this area is universal. The expert doesn't have to have experience in AZ. or in any other state." We disagree with the latter assertion.

¶4 To establish medical malpractice, A.R.S.§ 12-563 requires a plaintiff to show that a health care provider, such as Crawford, failed "to follow the accepted standard of care" by proving, inter alia, that the provider "failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which [the provider] belongs within the state acting in the same or similar circumstances."

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[3]*Mohave Elec. Coop., Inc. v. Byers,* 189 Ariz. 292, 942 P. 2d 451 (App. 1997).

This statue, as we made clear in *McGuire v. DeFrancesco*,[4] imposes a statewide standard of care, rather than a universal standard of care, for all health care providers.

> This court has interpreted § 12-563 to hold specialists, like other health care providers, to a statewide standard of care. *Gaston v. Hunter*, 121 Ariz. 33, 53 n. 21, 588 P. 2d 326, 346 n. 21 (App. 1978); *see also* M. Udall & J. Livermore, *Law of Evidence* § 25, at 44 (1982). Plaintiffs point out, however, that our *Gaston* footnote to this effect was merely dictum. Plaintiffs urge us to now interpret § 12-563 more narrowly to provide a statewide standard for general practioners only, leaving unaltered the general specialty standard of *Kronke* [v. *Danielson*, 108 Ariz. 400, 499 P. 2d 156 (1972)]. We decline to do so. The statue makes no such distinction, referring to the inclusive category of "health care providers" as a whole.[5]

And, as we noted in *Gurr v. Willcutt*,[6] the plaintiff must establish this statewide standard of care to withstand summary judgment.

¶5 In granting summary judgment here, the trial court found from its review of Rivera's deposition that he had "received his entire college and medical training in Mexico," that his medical practice "has all been in México," that he

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[4]168 Ariz. 88, 811 P. 2d 340 (App. 1990).

[5]*Id.* at 91, 811 P. 2d at 343.

[6]146 Ariz. 575, 707 P. 2d 979 (App. 1985).

"has never been licensed to practice medicine in the United States," that he "has never trained nurses or other health care providers in the United States," and that "he is not familiar with the standard of care for nurses in Arizona." Because Rivera's deposition testimony supports these findings, the trial court did not abuse its discretion in ruling that Rivera lacked the requisite foundation to testify about the standard of care for nurses in Arizona.

¶6 McManus further argues, however, that he asked to substitute nurse Carol Wichita for Rivera as his standard-of-care expert, but the trial court failed to rule on his request. The record discloses that McManus initially disclosed Wichita as his standard-of-care expert. When Crawford moved for summary judgment because McManus had not disclosed Wichita's opinions, as required by rule 26.1(a)(6), Ariz. R. Civ. P., 16 A.R.Z., McManus told the trial court at the hearing on Crawford's motion that Rivera would be his standard-of-care expert. The court granted McManus "an additional thirty (30) days to obtain an affidavit from Dr. Rivera . . . [and] file [it] with the Court." McManus did so, and based on the affidavit, the court denied the motion for summary judgment but granted Crawford leave to renew the motion after Rivera was deposed.

¶7 Following the deposition, Crawford again moved for summary judgment, arguing that Rivera was not qualified to provide expert testimony and, thus, that McManus could not prove medical malpractice. After McManus responded to the motion, he filed a request to substitute Wichita as his expert, stating that Rivera "may not be able to attend the trial in February 2000." The trial court later issued its minute entry granting summary judgment but did not address the request to substitute. McManus filed a motion for reconsideration and, in it, noted that he "didn't receive a reply" to the request to substitute. The court denied the motion but, again, did not rule on the request. We find no error. Once the trial court had granted summary judgment, a trial on the merits was unnecessary. Because the only reason McManus gave for substituting Wichita was Rivera's potential unavailability for trial, a ruling on the request to substitute was likewise unnecessary.

¶8 Finally, in his supplemental opening brief, McManus raises two issues about the trial court's judgment awarding costs: (1) Should they be verified with receipts, and (2) Should they be paid presently or when all appeals are concluded? We deem the first issue moot because McManus stated in his motion concerning costs that he had "no problem with verified taxable

costs," and the record shows that Crawford filed a verified statement of costs in accordance with A.R.S. § 12-346.

¶9 As to the second issue, McManus cites no authority for his argument that "payment of costs should be made when the case is over." The only authority of which we are aware for staying a judgment pending appeal is Rule 7, Ariz. R. Civ. App. P., 17B A.R.S., which allows an appellant to "obtain a stay by filing a supersedeas bond in the superior court." Because McManus did not file such a bond, he was not entitled to a stay on appeal of the judgment awarding costs.

¶10 For the foregoing reasons, both the summary judgment and the judgment awarding taxable costs are affirmed.

_____

WILLIAM E. DRUKE, Judge

CONCURRING:

_____

PHILIP G. ESPINOZA, Chief Judge

_____

JOSEPH W. HOWARD, Presiding Judge

APPENDIX B

Supreme Court

STATE OF ARIZONA

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October 5, 2001

RE: JAMES J. McMANUS vs LESLIE CRAWFORD
Arizona Supreme Court No. CV-01-0056-PR
Court of Appeals Division Two No. 2 CA-CV 00-0022
Pima County Superior Court No. 326349

GREETINGS:
The following action was taken by the Supreme Court of the State of Arizona on October 03, 2001, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Supreme Ct = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 5th day of October, 2001.

Noel k Dessaint, Clerk

TO:
James J McManus
Kari B Zangerle, Vicent J Montell and Stephen M Johnson, Sanders & Parks PC
West Publishing Company
Lexis-Nexis
Joyce A Goldsmith, Clerk, Court of Appeals, Division Two, Tucson

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